

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

MISC. APPLICATION NO.696 OF 2018

**[Arising from Misc. Application No. 039 of 2018; Misc. Application No.850 of 2017 and
Misc. Cause No. 414 of 2017]**

BISHOP JACINTO KIBUUKA:.....:APPLICANT

VERSUS

- 1. THE UGANDA CATHOLIC LAWYERS SOCIETY**
- 2. HON. SEWUNGU JOSEPH:.....:RESPONDENTS**
- 3. JUDE MBABAALI**

RULING

BEFORE: HON. JUSTICE SSEKAANA MUSA

This is an application to set aside the dismissal of the applicant's miscellaneous application No. 039 of 2018 and reinstatement of the same to be heard on merits Order 9 rule 23, Order 52 rules 1 & 3 of the Civil Procedure Rules.

This application has a checkered history as set out by the applicant and it is important that the same is reproduced as presented by the applicant's counsel.

The Applicant filed Misc. Cause No. 414 of 2017 against the Respondents seeking, among others, that the private criminal proceedings in Criminal Case No. 940 of 2017 instituted by the Respondents at Chief Magistrates' Court at Buganda Road are an infringement of his freedom to practice religion guaranteed under Article 29(1)(c) of the 1995 Constitution.

During the pendency of Misc. Cause No. 414 of 2017, the Applicant filed Misc. Application No. 850 of 2017 seeking for temporary injunctive orders against the Respondents to restrain them from threatening the Applicant's freedom of worship. The Respondents approached the Applicant's lawyer with a view of exploring avenues of settling the court matters out of court. To demonstrate this desire, the Respondent forwarded a draft copy of the consent withdrawal to the Applicant's lawyers who ably edited the same and returned it to the Respondents.

When the matter came up in court for consideration of the parties' intention to have a settlement, Respondents' counsel presented the old version of the consent which had no input of the Applicant's lawyers, and same was endorsed contrary to Applicant's interest. Mr. Wameli, counsel for the Applicant who had personal conduct of the matter had instructed Mr. Wananda to hold his brief.

The Applicant being aggrieved by the signed consent withdrawal which was contrary to the instructions to his lawyers, instructed the said lawyers to apply for and set aside of the said consent withdrawal order and same was filed in this court vide Misc. Application No.039 of 2018.

When Misc. Application No. 039 of 2018 came up for hearing, the Applicant's counsel (Mr. Wameli) did not attend court owing to illness and neither did he brief another lawyer nor inform the Applicant to attend court. The application was therefore dismissed for non-appearance. The Applicant filed the instant application No. 696 of 2018 for reinstatement of Misc. Application No.039 of 2018 seeking for review and setting aside the Consent order passed in Misc. Application No. 850 of 2017 arising out of Misc. Cause No. 414 of 2017.

The present application is in essence seeking for setting aside the orders of this court dismissing Misc. Application No. 039 of 2018 and orders for reinstatement of the said Application to be heard on its merits.

The applicant was represented by Wameli Anthony and later a law firm of Ssemambo and Ssemambo was instructed to take over the conduct of the matter later at the stage of filing submissions while the 3rd respondent appeared personally but his lawyer Ssemwanga was not present in court.

The applicant's counsel submitted that the Applicant in order to succeed in this Application brought under Order 9 Rule 23 (1) of CPR has to demonstrate to the satisfaction of court that there is **sufficient cause** that prevent him from none appearance in court when the Application was called up for hearing.

The powers of this court to exercise its discretion to set aside and reinstate the dismissed application are not in dispute. What is important to demonstrate to court is whether the Applicant has sufficient cause to warrant the setting aside and reinstatement of the dismissed Application.

The term sufficient cause has received extensive adjudication on its meaning. In the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others* quoted in *Gideon Mosa Onchwati vs Kenya Oil Co. Ltd & Another [2017] eKLR* discussing what constitutes **sufficient cause** had this to say:-

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant.”

In the same Kenyan authority of **Gideon Mosa Onchwati** (supra) reliance was made on the Supreme Court of India case of *Parimal vs Veena* which attempted to describe what was "**Sufficient cause**" when it observed that:-

"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and

circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

In the instant Application, the Applicant by way of affidavit set out circumstances and matters which prevented him from attending court and the circumstances under which the Application was dismissed when it was called up for hearing on 1st November, 2018.

The Respondents have not challenged the said facts as deposed by the Applicant in his affidavit at all. It is our submission that the failure of the Applicant's previous lawyers to attend court on 1st November, 2018 or to inform him about the said hearing date when the Application came up for hearing, should not be visited on the innocent Applicant. The Applicant has always attended court whenever his case came up for hearing as set out in his affidavit.

It was the submission of the applicant's counsel that the Applicant has offered a candid and frank explanation as to why he did not attend court and that it is owing to a failure on the part of his previous advocates to inform him about the hearing date, he lost the opportunity to do so. The Applicant only learnt of the said dismissal after a few days after 1st November 2018 through his previous lawyers.

The applicant's new counsel further contended that the Applicant's former Advocates were served with the hearing notice but chose not to attend court. It was as a result of the Applicant's former advocates' conduct that the Applicant lost an opportunity to prosecute the Application for review and setting aside the consent order. According to counsel this, has been held to amount to sufficient cause.

Applicant's counsel cited the case of **Banco Arabe Espanol Vs. Bank of Uganda, SCCA No. 8 of 1998** where it was held that;

"A mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on its merits."

It was his submission that the foregoing proposition of the law has been variously adopted by courts of law (**CANSTER RAGS (U)LTD} VS STANBIC BANK (U) LTD} & Anor MISC APPLN NO 401 OF 2014 (ARISING FROM HCCS NO 159 OF 2012)**).

He further submitted that it was as a result of this inexcusable conduct by the Applicant's former counsel that drove the applicant away from the seat of justice as he was condemned unheard. The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law.

He prayed that court be pleased to find that the Applicant had sufficient cause not to attend court on the day Misc. Application No. 039 of 2018 was called for hearing and further pray that the same be reinstated and set down for hearing on its merits as the ends of justice require.

On the other hand, the respondents' counsel submitted that the applicant has not demonstrated to court that there was any justifiable reason why the dismissal should be set aside.

According to the respondent's counsel, the phrase 'sufficient cause' is normally interchangeable with the phrase 'good cause' and has been held to relate to inability or failure of the a party to take a particular step at a particular time.

It was his contention that the said advocate has not attached photocopies of his medical forms and that the said lawyer did not depose any affidavit to that effect. According to him whatever the applicant stated was hearsay.

This court has powers under **Section 98 of the Civil Procedure Act Cap 71** to make such orders as may be necessary for the ends of justice as well as under **Order 9 Rule 23 of the Civil Procedure Rules** to set aside dismissal on sufficient cause being shown.

In the cases of **Florence Nabatanzi vs. Naome Binsobodde SC Civil Application No. 6 of 1987** and **Sipiriya Kyaturesire vs. Justine Bakachulike Bagambe CA No. 20/1995** both courts noted that;

- (a) **First and foremost the application must show sufficient reason which relates to the inability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts. See Mugo vs. Wanjiru (Supra).**
- (b) **The administration of justice normally requires that substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from pursuit of his rights – see Essaji vs. Solanki (supra).**
- (c) **Whilst mistakes of counsel sometimes may amount to an error of judgment but not inordinate delay negligence to observe or ascertain plain requirements of the law. Attorney General vs. Oriental Construction Limited (supra).**
- (d) **Where an applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirement of the law.**
- (e) **A vigilant applicant should not be penalized for the fault of his counsel on whose actions he has no control.”**

Respondents Counsel's submission that the applicant has not attached medical forms is devoid of merit since not every sickness/illness leads to seeking medical attention unless a party states that he states that he went to see a doctor.

A party could have been feeling unwell and opted to rest and or took simple medication to feel better. It is not a requirement of the law that whenever a person is ill he/she must produce medical documents in proof of sickness or illness.

The respondents counsel has also submitted that the evidence of sickness was made by the applicant and that this was hearsay. He wondered why the said lawyer who was sick had not deposed any affidavit.

Under Order 19 rule 3 of the Civil Procedure Rules, in applications like the present one an affidavit may contain evidence of this nature to prove sickness/illness.

The Supreme Court has in several cases held that inadvertence of counsel can constitute sufficient reason to extend time. In **Kaderbhai & Anor vs. Shamsherali & ors** S.C. Civil Application No. 20 of 2008 Okello, JSC, held that the inadvertent failure of counsel to serve a Notice of Appeal and to copy to and serve the letter requesting for record of proceedings constituted the necessary sufficient cause.

In **AG vs. AKPM Lutaaya** SCCA No. 12 of 2007, Katureebe, JSC, held that the litigant's interests should not be defeated by the mistakes and lapses of his counsel. And in **Godfrey Mageze & Brian Mbazira vs. Sudhir Ruparelia** SCC Application No. 10 of 2002 Karokora, JSC, held that the omission, mistake or inadvertence of counsel ought not to be visited on the litigant, leading to the striking out of his appeal there by denying him justice

In **Joel Kato & Anor v Nuulu Nalwoga (Misc. Application No 04 Of 2012) [2012] UGSC 2 (26 June 2012)**; the Supreme Court held

“I do not think it is right to blame the applicants, lay people as they are, for the delay in securing the record of proceedings from the Court of Appeal. These are matters which squarely fall within the province of professional lawyers who possess the necessary training and experience to handle them. That is why I believe the applicants found it necessary to engage new lawyers to deal with them.”

On that premise as shown in the different authorities herein discussed, it is just and fair that this application be allowed; the order of dismissal is set aside and the main application No. 39 Of 2018 is re-instated.

This application is allowed with no order as to costs.
It is so ordered.

SSEKAANA MUSA
JUDGE
11th/04/2019